(6)

Supreme Court, U.S.
FILED
APR - 8 2005
OFFICE OF THE CLERK

No. 04-1198

In The Supreme Court of the United States

JOHN MELVIN ALEXANDER, ET AL.,

Petitioners,

v.

STATE OF OKLAHOMA, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LARRY V. SIMMONS
Counsel of Record
and
ROBERT R. EDMISTON
Assistant City Attorneys
200 Civic Center, Third Floor
Tulsa, Oklahoma 74103
(918) 596-7717

Attorneys for Respondent City of Tulsa, Oklahoma

April 8, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

OPINIONS BELOW AND JURISDICTION

The opinion of the District Court (Pet. App. 18a-41a) is unpublished. The opinion of the Court of Appeals for the Tenth Circuit (*id.* 1a-17a) is published at 382 F.3d 1206 (2004). The denial of rehearing en banc and accompanying dissenting opinion (*id.* 42a-54a) are published at 391 F.3d 1155. The court of appeals issued its opinion on September 8, 2004, and denied rehearing on December 13, 2004. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT

In February 2003, Petitioners sued the City of Tulsa and the State of Oklahoma for damages sustained during the 1921 Tulsa Race Riot. Petitioners alleged they were victims or descendants of victims of the Riot which took place over a fifteen (15) hour period May 31 – June 1, 1921. The Riot left a substantial portion of Tulsa's African American Community devastated. By the middle of 1923, hundreds of African Americans had filed over $4,000,000.00 in damage claims against the City of Tulsa. Following the City's denial of these claims, and immediately prior to the two-year anniversary of the Riot, African Americans filed hundreds of civil lawsuits against the City. These lawsuits, all filed in 1923, contain the same allegations against the City asserted by the Petitioners in their 2003 Complaint. However, unlike the hundreds who filed claims and lawsuits in 1923, the Petitioners waited more than 80 years before taking *any* action to pursue their legal rights. (Answer to Interrogatories #2 and #22, Joint Appendix, Vol. 1, pp. 504 & 510). When Petitioners finally filed their Complaint in 2003, the City responded with a Motion to Dismiss and Alternative Motion for

Summary Judgment based upon the applicable two-year statute of limitations. After a hearing at which Petitioners submitted witnesses and other evidence, the District Court determined Petitioners' claims, filed eighty-two (82) years after the events at issue, were conclusively time barred. The Court of Appeals for the Tenth Circuit affirmed.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONERS ARE ASKING THE COURT TO REVIEW THE LOWER COURT'S FACTUAL DETERMINATION, AS TO THE SUFFICIENCY OF THE EVIDENCE PRESENTED BELOW, IN ORDER TO RESOLVE AN ALLEGED CONFLICT AMONG THE CIRCUITS THAT IS IRRELEVANT TO THE ULTIMATE OUTCOME OF THE CASE BEFORE THE COURT.

Equitable Tolling

As set forth in their petition, Petitioners would have the Court examine a voluminous evidentiary record to determine the validity of the independent conclusion of each of the two lower courts that the extraordinary circumstances which made resort to the courts futile in the years immediately following the Riot had sufficiently dissipated by the end of the 1960's to restart the two-year statute of limitations. Such review is unwarranted for several reasons. First, Petitioners truly dispute only the fact finding on this issue, rendering review by this Court unnecessary. See Sup.Ct.R. 10. Second, as the Court of Appeals duly noted, the Petitioners did not allege or even imply they were prohibited from accessing the courts after

the 1960s. And third, it is undisputed that for thirty (30) years thereafter, none of the Petitioners took *any* action whatsoever to pursue his or her legal rights. See *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 104 S.Ct. 1723, 1726, 80 L.Ed.2d 196 (1984) (One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.). On this record, the District Court's decision on the issue of equitable tolling would be sustained under any of the standards used by other courts of appeals.

Claim Accrual

Petitioners misrepresent the Court's accrual analysis when they assert: "In the context of *accrual*, the Tenth Circuit deemed it entirely irrelevant that petitioners did not know prior to 2001 of the government's role in the Tulsa Riot." (Pet. Br. P. 20 n.4). This is simply not true. In fact, the trial judge noted in his Order that the wording of the Complaint vividly demonstrates cause to conclude that the Plaintiffs' knowledge of the City's role and the participation of the National Guard in the Riot cannot be credibly disputed. Indeed, the Riot was an open and notorious event. The peace of the city was interrupted by widespread gunfire and a substantial portion of the city burned to the ground. The event was reported in local, state and national news publications and there were at least a thousand eyewitnesses.

The Binkley Wright "testimony", the hundreds of claims filed *against the City* and the lawsuits filed *against the City* which followed paint an indisputable image, clearly held and espoused by the African American community in the 1920's, that the City of Tulsa and its officials acted

with conspiratorial lust and zeal to direct destruction upon Tulsa's African American community. Contrary to Petitioners' representation of this issue, both the District Court and the Court of Appeals found no credible doubt that if the Petitioners had been diligent they would have known all they needed to know about the circumstances of the Riot to file their lawsuit prior to February 2001. There is no pressing need for this Court to sift through the voluminous record below to determine the sufficiency of the evidence because all the Petitioners really challenge here is the fact-bound application of well-settled legal principles to the unique facts of this particular case.

CONCLUSION

Reduced to their essence, the Petitioners' arguments present no justification for this Court's review of the decision below. Accordingly, the Petition for writ of certiorari should be denied.

Respectfully submitted,

LARRY V. SIMMONS
Counsel of Record
and
ROBERT R. EDMISTON
Assistant City Attorneys
200 Civic Center, Third Floor
Tulsa, Oklahoma 74103
(918) 596-7717

Attorneys for Respondent
City of Tulsa, Oklahoma